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United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THE HOME INSURANCE COMPANY OF NEW YORK, a corporation,

Appellant,

vs.

MERYL KIRKEVOLD, doing business as BARNES-WOODIN FUR DEPARTMENT,

Appellee.

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UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

BRIEF OF APPELLEE

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STATEMENT OF THE CASE

Appellee, Meryl Kirkevold, first started in the fur business in 1926, while still a student in high school, and has been in the fur business ever since said time—first working for others and ultimately owning his own shop.

In 1942, in the month of August, Mr. Kirkevold moved in with the Barnes-Woodin Company, having his own fur business therein and paying to the Barnes-Woodin Company a certain percentage of gross sales and business.

Previous to Mr. Kirkevold's taking over the space in the Barnes-Woodin Company, others had been engaged with the Barnes-Woodin Company in the fur business; so that Mr. Kirkevold took over the space formerly occupied by them, which consisted of a storage room on the second floor of the building, a sales room on the mezzanine and, in connection with said sales room, a work room.

All the insurance of Mr. Kirkevold had been handled through the Yakima agency of Hargreaves & Orkney. Hargreaves & Orkney had handled this insurance for Mr. Kirkevold in his previous locations in Yakima and had, also, handled the insurance of the former occupant of Barnes-Woodin Company (309 to 312). Mr. Orkney, upon being advised of Mr. Kirkevold's change of location prepared defendant's exhibit "A" (170), the same being prepared from the information then on hand, presented the same to Mr. Kirkevold for his signature, and pursuant to said applica-

tion the appellant issued an insurance policy being plaintiff's exhibit "1" (44), insuring customers' coats in possession of appellee.

The business of appellee expanded with great rapidity, and it was, therefore, necessary for him to secure additional space; and in the year 1943 appellee expanded his operations on the mezzanine floor and took over space which had been formerly used by the Barnes-Woodin Company for the storage of manikins and display material. So, from sometime in the year 1943 to May 9, 1944, appellee's business was composed of the following: He still retained upon the second floor of the building, a storage room where coats are placed for permanent summer storage. On the landing, adjacent to said upstairs storage room, there was a cleaning room where the coats were cleaned and demothed. On the mezzanine floor, there was appellee's retail sales room, which was completely closed off from the rest of appellee's operations on the mezzanine floor by walls constructed to the ceiling, and into which walls were display cases; and in one corner of this display room, being the northwest corner, was a door-way used for the purpose of entering his work room and mezzanine storage room. The south side of the show room was not closed off except by a low wall, so that a person could look off of the mezzanine into the main part of the store. Directly to the north of the show room was a narrow room, which has been re-

ferred to throughout the trial as a work room, in which the employees worked upon the coats, and in said work room was a large ceiling rack where were hung the coats which were being worked upon at the time, and on the north side of said work room were situate the sewing machines and other necessary machinery to be used by the employees for their work. Directly to the west of the show room was the space which had been formerly occupied as storage room by the Barnes-Woodin Company and which, in 1943, appellee took over for his own use. In said space he constructed a wall completely closing off the mezzanine balcony from the remainder of the store, leaving, however, a cat-walk between the wall which he constructed and the south railing, so that to use the balance of the mezzanine the Barnes-Woodin employees would not have to go into this room or through this room.

In this mezzanine store room appellee constructed a series of racks and hanging bars, some permanent and some movable; both the work room and the mezzanine store room were entered through the door-way from the show room. Though there was no door or other wall separating the mezzanine store room and the work room, there was a very decided jog in the walls around the show room which distinctly separated the two units. Off of said jogged space there was a door-way which let to a stairway, which was used by the employees while going from the mezzanine

work room and store room to their cleaning room and store room on the second floor, and which was, also, a fire escape to be used in the event of emergency to the outside. This door-way was kept unlocked during the day time for the convenience of appellee's employees, but always locked at night and when no one was in said establishment.

Appellee was engaged in the retail sale of furs and fur coats, and, also, the repair, alteration and storage of customers' coats. Appellee's procedure in the handling of the coats was—that when a coat would be brought in for storage, repair or alteration, the same was delivered to his retail show room, and from there the coat was taken to the mezzanine store room where it might remain for one to three months, depending upon the back-log of business, then the coat would be taken to the work room where any necessary work or repairs would be done upon it. It would then be taken to the cleaning room upon the landing of the second floor, and from there would be put into permanent storage in the second floor storage room. A coat which was left merely for repair or alteration would go through the same process, except that in the event it was not to be cleaned and stored, it would be taken from the work room after the necessary work was performed and returned to the mezzanine storage room, and would there await delivery to customers.

A person desiring to secure a coat would present him-

self at the show room and a person would be sent to secure the coat, either from the mezzanine store room or from the second floor store room, depending upon where the coat was located at that time.

On May 9, 1944, a fire broke out in the Barnes-Woodin building somewhere in the vicinity of appellee's work room. The cause of the fire was never determined, but was thought to be the result of defective wiring. There was no evidence that the fire was the result of a cigarette, as is intimated by counsel, for that is merely his own thought based upon no facts whatsoever.

As a result of this fire the coats that were situated at the time in the work room, and those in the mezzanine store room, and those in appellee's show room were almost completely destroyed. Other portions of the store were likewise gutted, but that is material only in this: that it shows that the fire was not solely centered in the appellee's business.

Appellee had other insurance covering his own stock of goods and equipment, and therefore the only question that remained for settlement was the question of coverage upon customers' goods in the possession of appellee.

Appellant assigned one R. B. Sinclair as adjuster, upon being notified of the loss. Mr. Sinclair worked upon said matter until about the 9th or 10th of July, at which time he

was transferred to California. Mr. Sinclair, however, was in an automobile accident (260) on or about the 24th or 25th of June, at which time his real adjusting on this matter was terminated.

Sometime late in July, Mr. L. M. McKinley was assigned as adjuster on this loss. The question then arose as to whether the $10,000.00 or the $100,000.00 coverage of the insurance policy applied to the loss in question. The parties being unable to agree, several conferences were held between the adjuster, counsel for the appellant, and the appellee and his counsel.

As a result of these conferences and being unable to reach a settlement, and because of the fact that there were approximately 150 people who had suffered a loss in said fire, making it too cumbersome to file a petition in interpleader, it was agreed that the appellee would make settlement with all of his customers, and that the appellant would pay him $10,000.00 without prejudice to either of the parties to said transaction. The payment of the $10,000.00 amount to be made proportionately as settlement was completed with customers.

Appellee proceeded with settlement, and appellant paid to appellee $8,200.00, and held in reserve the sum of $1,800.00 due to the inability of appellee to make settlement with several customers. Appellee within the proper time filed a formal Proof of Loss upon appellant, showing

loss in the sum of $29,785.00. Subsequent thereto appellee instituted suit in the Superior Court of the State of Washington in and for Yakima County, against the appellant, Home Insurance Company of New York, giving credit to appellant for all moneys paid and requesting judgment in the sum of $22,495.00 together with the interest at 6% per annum from May 9, 1944, until paid; said action was subsequently moved to the District Court of the United States for the Eastern District of Washington, Southern Division, by reason of diversity of citizenship, and the amount sued being in excess of the minimum allowed in said District Court.

Appellant, thereafter, filed an answer and counter claim against third-party defendants; all of said third-party defendants, however, defaulted in said cause of action and the question of their rights is not before this Court and are immaterial.

Appellee filed a reply, a request for a pre-trial hearing, and a request for admission; as a result of said admission appellant admitted the genuineness and validity of the releases and assignments. The Court granted a pre-trial hearing, and as a result of which the issues between the parties were narrowed down to the following specific questions:

(1) As to the question of liability of the appellant, Home Insurance Company, under the terms and conditions

of the insurance policy, being a question of liability under the $10,000.00 or $100,000.00 provision to be determined by evidence and fact as to place of storage and interpretation of policy.

(2) As to the liability of the defendant, Home Insurance Company, based upon individual floater policies; that is, as to whether said policies are under the policy limitations, if there are such limitations, or whether they are in addition thereto.

(3) Actual amount of *loss dependent upon value of coats destroyed,* parties to be limited in proof of valuations but not to exceed three expert witnesses on each side, said number not to include the coat owners, who shall be allowed to testify in addition to experts.

(4) Liability to third-party defendant Dorothy Riggs and her claim in said action.

(5) Question as to when interest would begin to run on any amount of recovery.

And then the general further provision that it was further ordered that there was included and admitted at said pre-trial hearing that the number of coats destroyed or damaged is approximately 149, being the coats listed in the Proof of Loss, less certain ones which were to be omitted, together with the third-party defendants. That the Proof of Loss, as made by plaintiff is sufficient. That no claim

will be higher than the valuation set forth on the receipt issued to coat owners, except in the case of those coats upon which there was a separate policy with the company.

With this back ground, the cause of action went to trial before the Hon. Charles H. Leavy. Appellee offered evidence as to the value of each and every coat which was destroyed in said fire. The valuation of said coat being at the time of its destruction. The appellant offered no controverting testimony as to the values. The Court, at the close of the case, granted judgment to appellee in the amount based upon the valuation of the coats, as testified by appellee, with the exception that where appellee had made a cash settlement with a customer for less than the value of the coat, or less than the value claimed in the Proof of Loss, the amount was reduced to coincide with such cash settlement. Where the valuation had been fixed by a customer upon a receipt, the valuation was limited to that amount, except in certain cases wherein a separate floater policy had been issued to customers and the value of that policy was used therein as the basis of judgment.

The Court, however, did suggest that he wondered if appellee should not be limited in the amount of recovery based upon some replacement value of the other coats. Upon being advised of the pre-trial order, the pleadings and testimony, he however abandoned this thought.

However, after appellant moved for a new trial, the

Court changed his oral opinion and stated that our liability should be limited, and over objection a subsequent hearing was held, the only witness being the appellee himself, who testified to certain valuations consisting of retail value of coats sold or replaced, the amount of cash settlement and, also, the testimony as to his cost of doing business. As a result of which the Court reduced the amount of his former judgment to conform to the new figures, and granted judgment to appellee in the lesser sum of $19,086.45; and it is from this judgment that appellant has appealed.

A few additional facts necessary to proper understanding of this case are in reference to the relation of the appellee and the agent of the insurance company. Mr. Kirkevold dealt exclusively with Mr. Orkney of the firm of Hargreaves & Orkney, the local representatives and agents of the appellant. Mr. Orkney testified that he was to the appellee's establishment very frequently and that he saw the building and the alterations as they were made therein. Mr. Orkney further testified that the premium for this insurance was based upon a monthly valuation of all of the customers' coats in the possession of appellee, including not only those in storage but those for repair as well (308); and that appellee paid double insurance upon the persons who held floater policies. That said coats belonging to persons holding the certificate or floater policy were listed at a maximum storage value of $200.00 upon the

receipt, and in addition thereto a premium was paid to the company upon the value of the coat as listed in said certificate. All of these facts were known to Mr. Orkney.

Further, it is admitted in appellant's pleadings that all of the certificate holders filed due and timely Proof of Loss upon the full amount of their certificates.

ARGUMENT

In this argument we will first attempt to answer the several contentions advanced by appellant, and will then advance additional ones on appellee's behalf. For the purpose of easier reference we have used appellant's titles as the titles of our separate answering arguments.

The main question in this cause of action was whether that certain room on the mezzanine floor of the Barnes-Woodin Company constituted a storage room. Appellant's first contention is that the space on the mezzanine that was used for storage

A. "WAS NOT A ROOM."

This space was enclosed on the west by the permanent wall of the building, on the south by a plywood wall constructed by appellee, on the north by a permanent wall of the building adjacent to a stairway, and on the east by permanent constructed floor-to-ceiling show cases, the backs of which formed the east wall to this room. The only

place where this room was not enclosed was through the narrow passageway, or jog, that went from this storage room to the work room to the north and east. This mezzanine store room was a separate unit, distinctly separated from any of the other units used by appellee on the mezzanine floor. Appellant has attempted to infer and instill in the Court's mind that this is one room, and has made no distinction between the two spaces, but has referred to them as easterly and westerly ends. Appellee Kirkevold testified (173) that there were no tables, sewing machines or anything of that kind in the westerly part of the room where they have the store room. The testimony definitely showed without controversy that this room was used solely and exclusively for storage purposes. Coats and furs would remain in this room for a period from one to three months (223, 234).

Assuming, for the sake of argument, that there might be some basis to the contention of appellant that there was some work carried on within the general overall room, which fact we deny, we fail to find any restrictions in the insurance policy stating that the storage room must be used exclusively for storage. We believe the Court can take judicial knowledge of the fact that though we might eat our meals within the four walls of a kitchen of a house this does not change the fact that the room is a kitchen. We have contended throughout, and the trial court has seen fit to follow this contention, that the work room to the east of

the sales room was one room. And that the storage room to the west of the sales room was a separate and distinct room, both being separate units. This, in our opinion, is nothing more than a question of fact determinable by the trial court and which should not be disturbed unless the evidence preponderates against this finding.

Lewis vs. United States Seventh Circuit Court of Appeals, 113 Fed. (2) 489;

Kentucky Coal Lands Co. vs. Mineral Development Co., C. C. A. Ky. 295 F. 255;

Aetna Insurance Co., of Hartford Conn. *vs. Licking Valley Milling Co.,* C. C. A. Ky. 19 F. (2d) 177.

As we have before set out, counsel would have this Court believe that there were no walls or partitions between the work room to the north and the store room to the west of the show room, by referring to the mere separation by show cases, we assume, with the inference to be drawn therefrom, that these are small type, regular show cases. These show cases extended clear to the ceiling (162) and were of a permanent built-in nature, the backs of which constituted a permanent wall.

B. "WAS NOT A STORAGE ROOM."

Counsel has attempted in the determination of the storage room and the work room to designate it as one continuous room, by reference to the easterly and the westerly portion thereof. We think "Exhibit 5" (the diagram), and

the testimony clearly shows that these were two separate units; and though they were connected were separate units, not only as to use but as to location. Counsel has argued that the only storage room used by appellee was that on the second floor, and that there was none situate on the mezzanine. This is contrary to the findings of fact of the trial court; and, we again state, should not be overruled or reversed, except where there are no facts to substantiate the court's ruling.

In the case of *Tollifson vs. People*, 49 Colo. 219, 112 Pac. 794, is cited the following definition:

> "Webster defines a store house as a building for keeping goods of any kind, especially provisions, a magazine, a repository, a warehouse; and a store room as a room in a store house or repository, a room in which articles are stored."

Webster's New Internation Dictionary defines "store room" "1—a room for the storing of supplies or other articles, especially of a household or a ship.

2—space for storing in a store house or repository."

Bandosz vs. Daigger & Co., 255 Ill. App. 494, gives the following definition:

> "Storage is the act of depositing in a store or warehouse for safe keeping."

Webster's New International Dictionary defines "storage" as follows:

> "Act of storing or state of being stored; specifically, the

safe keeping of goods in a warehouse or other depository.

Space for the safe keeping of goods."

Webster's New International Dictionary defines room:

"Space which may be occupied by or devoted to any object. Space enclosed or set apart by a partition; an apartment or chamber."

When coats were brought in by customers for storage, appellee accepted the responsibility of that storage from the time that they were brought to him; and the storage charged for said coats began at the time they were delivered to appellee. Appellee maintained in his place of business two storage rooms—one upon the mezzanine floor where coats were stored pending the time when they could receive the attention of appellee's employees, and then be placed in the permanent storage upon the second floor. The mezzanine floor was designated by appellee and his employees as a storage room and not as a work room, contrary to the statements made by counsel; for the work room as referred to by appellee and his employees, and witnesses, referred to that space north of the show room and not to the over-all space of the mezzanine store room and the work room.

Counsel has made much of appellee's signing defendant's "Exhibit A", which was the application for the insurance policy and which only listed the space used for

storage of customers' property upon the second floor of the Barnes-Woodin Company. This application was true at the time it was entered into, for that was in August, 1942, at which time that was the only space that was used for storage in that location; subsequent thereto, however, the appellee took over additional space on the mezzanine floor and converted that into a storage room by the building of a partition across the south side and the placing therein of permanent and movable racks, and which was used exclusively for storage. (193, 212 to 217). Further, it must be remembered that this application was prepared by the appellant's own agent; though it was true that it was signed by appellee. Appellant's agent, Mr. Orkney, however, was present many times during the construction of this new storage space (198 to 200-312).

It is, therefore, our contention that the company, thru their representative and agent, was at all times fully and completely advised of the changes and manner of operation of Mr. Kirkevold. There are no restrictions in the insurance policy "Exhibit 1", which limits Mr. Kirkevold to the having of only one storage room. As a matter of fact, the language of the $100,000.00 limitation is in "storage rooms" (plural), "vaults" (plural), and "safes" (plural). It must be remembered that this insurance policy was written by the appellant and should be construed most liberally in favor of the appellee. Had the insurance company, appellant

herein, desired to limit the area of operation of appellee, they had that opportunity in the writing of their policy. *29 Am. Jur.* 534, Par. 684:

> "An insurance company may properly insert in its policies reasonable conditions as to the use of the property insurance. It has been held that a provision in the policy insuring a building "while occupied as" and for a specific purpose, if unqualified effects a warranty that the building will continue to be so used during the term of the policy, although, as a general rule, the mere description of a building as used for a certain purpose is not a promisory warranty that it shall be used for no other purpose. A privilege for all the process of the business insured will inllude an occupation necessary for the carrying on of such business."

Appellant has referred to the general custom in the fur business, and that this policy was written in contemplation of this custom. It should be noted by the court that appellant offered no evidence of any other furriers as to what the custom was in the trade. Appellant, further, sets forth the contention that if the Court should follow the trial court's interpretation of this contract, there was no reason for putting in the $10,000.00 limitation on the policy, for there would be no coats outside of storage rooms. We cannot agree with this contention, and neither did the trial court, for there were a considerable number of coats (20% to 25% of those destroyed) which were in the work room and which, at no time, has the appellee contended were in storage. Further, coats could be in the receiving room,

or other portions of the store, so that obviously there was some reason for this other limitation.

Counsel herein resents the inference of perjury as alleged by appellant on page 53 of his Brief, in stating that there had been no partition across the middle of the room prior to the imagination of counsel at the trial. We believe that there was no question as to how this room was constructed or where these partitions were and we challenge counsel to show any perjury in this trial.

We believe wholeheartedly with appellant's definition of storage as set forth on page 54 of its Brief, wherein they state

> "Storage connotes a permanent keeping or holding of goods to await some future contingency."

We don't think there is any dispute but that these coats in the mezzanine storage room were held there for a period of one to three months to await the contingency of their repair, cleaning and transfer to the second floor storage room. We, therefore, contend, as we have contended throughout this trial, that the room where 75% of these coats were destroyed was a storage room under the terms and conditions of the insurance policy.

C. "FINDING AS TO PERCENTAGES OF LOCATION OF DESTROYED COATS IS PURELY SPECULATIVE."

It should be remembered by the court that this matter

came on for trial on the basis of a pre-trial order. Which order provided that the actual amount of loss would *depend upon the value of coats destroyed.* This method of proof was followed throughout the original trial. Appellant raised no objection to any of the values offered and submitted *no evidence whatsoever* on its own behalf as to the values of any of the coats which were destroyed. The trial court, however, contrary to the arguments of appellee's counsel, ruled that this was not the proper measure of damage and, upon the insistance of appellant, ruled that the measure of recovery would be based upon the amount of the cash payments to customers, plus the cost of replacements; which method of recovery reduced the amount as originally figured upon the actual value of the costs. The court in determining the number of coats in storage, and outside of storage, charged 75% of the coats to those in storage and 25% to those outside of storage. This was based upon testimony of Mr. Kirkevold and one of his employees, Hazel Fiebelkorn (125, 166, 167 and 224).

By this ruling, appellant has not been in any way prejudiced for the court has used the figure most advantageous to appellant, for the testimony was that 20% to 25% of the coats destroyed were outside of the storage room and the court used the figure of 25%.

45 C. J. S. 915, page 1010:

"The fact that the amount of loss cannot be determined

without difficulty, or to some extent is a matter of estimate, does not affect insurer's liability or insured's right to compensation."

D. "$10,000.00 LIMITATION ALSO APPLIES TO CERTIFICATES."

As was set forth in the facts, appellee, under the authority granted him by the appellant, wrote individual certificates or floater policies. It is our belief that a determination of this question is immaterial, for the court made no specific finding on this matter, the same being unnecessary as a sufficient amount of coats came within the $100,000.00 limitation. These policies, however, were separate individual policies insuring the individual customer, and were a promise to pay; and as is admitted in the answer (25) it was admitted by appellant that it issued certain certificate endorsements to some of plaintiff's customers, and admitted that the customers named in said paragraph *timely filed proof of loss with said appellant.* This admission, on behalf of appellant, shows that sufficient proof of loss was made upon them and the action herein instituted was brought upon assigned claims from these certificate holders as well as the other customers. The insurance company, appellant herein, was therefore liable on these individual policies separate and apart from the other customers' coats held by appellee. A separate and additional premium was paid for this separate policy, as was testified to by appellant's agent, Mr. Orkney, (307) stating that Mr.

Kirkevold paid premiums twice on these certificate policies: first, in the payment in his monthly valuations; and second, as the overall premium for the issuance of this policy.

E. "JUDGMENT BASED UPON ERRONEOUS FINDINGS, INFERENCES AND CONCLUSIONS OF THE DISTRICT COURT MUST BE REVERSED."

We believe that we have fully and adequately answered this portion of appellant's argument in our answer against portion "A" of appellant's Brief.

F. "AMBIGUITY RULE IS NOT APPLICABLE."

Obviously, there must be some ambiguity or disagreement in the interpretation of this insurance policy, or the same would not have come for trial, and would not now be before this court on appeal. Therefore, we believe that there is an ambiguity question in the interpretation of this contract, and the application of the contract to the facts before the court; and, we contend that the general provisions of law upon the construction of such contracts apply to this cause of action.

Our courts have held continually that insurance contracts are to be construed liberally in insured's favor and strictly against insurer; and this particularly on an ambiguous insurance contract.

Kane vs. Order of United Commercial Travelers, 3 Wash. (2d) 355 at 359, 100 Pac. (2d) 1036

"It is the established rule in this, and many other states, that where a provision of a policy of insurance is capable of two meanings or is fairly susceptible of two constructions, that meaning and construction most favorable to the insured must be applied even though the insurer may have intended another meaning, because the insurer and not the insured is the author of the instrument."

Dowell Inc. vs. United Pacific Casualty Insurance Co., 191 Wash. 666 at 687, 72 Pac. (2d) 296.

"Respondent insists that the indorsement was not placed upon the policy for appellant's benefit but was for the benefit of those who may suffer damage from the operation recited in the endorsement. This contention is without merit. A liability policy is one in which the insurer assumes the liability of the insured.

"Respondent argues that, since the indorsement is not prepared by respondent nor by its experts, but that its form was imposed upon both parties to the contract, the general rule to the effect that ambiguous expressions in policies will be resolved against the insurance company is not applicable. While it is true that the existance of statutory endorsements may afford a reason for showing a tolerance in the application of this rule, we believe that this rule is applicable to the instant case in determining the intention of the parties to make indorsement number 1 an integral part of the master policy.

" 'The intention of the parties to the contract of insurance must be gathered from the contract itself from the risks excluded as well as for the risks included. In construing the language of the policy, if construction is needed, we are to keep in mind the familiar rule that the construction will be adopted which is most favorable to the insured.' There is another principle apply-

ing to contracts of insurance to the effect that if they are so drawn as to require interpretation and fairly susceptible of two different conclusions, the one will be adopted most favorable to the insured and will be liberally *construed in favor of the object to be accomplished.* And conditions and provisions therein will be strictly construed against the insurer as they are issued upon printed forms prepared by experts at the instance of the insurer, in the preparation of which the insured had no voice." (Italics ours)

Pennsylvania Indemnity Fire Corp. vs. Aldridge, 117 Fed. (2d) 774.

"But the general rule applicable in the interpretation of an insurance policy is that, if its language is reasonably open to two constructions the one most favorable to the insurer will be adopted. Any fair doubt as to the meaning of its own words should be resolved against the insurer as is said by the Supreme Court in *Aschenbrenner vs. United States Fidelity & Guaranty Co.* 'The phraseology on contracts of insurance is that chosen by the insurer and the contract in fixed form is tendered to the prospective policy holder who is often without technical training and who rarely accepts it with a lawyer at his elbow, so if its language is reasonably open to two constructions that one more favorable to the insured will be adopted.' Moreover, unless it is obvious that words which appear in insurance policies are intended to be used in a technical connotation they will be given the meaning which common speech imports. In this respect, the rule is the same as in statutory construction."

Hawkeye Casualty Co. vs. Western Underwriter's Ass'n. 53 Fed. Supp. 256.

"The authorities are uniform that an insurance contract is to be construed most favorably to the insured and that no *strict technical interpretation* of the contract should be made." (Italics ours)

Massachusetts Bonding & Insurance Co. vs. John R. Thompson Co., 88 Fed. (2d) 825.

"Unless the words of such a contract (insurance) are obviously intended to be used in a technical sense, they will be given the meaning that common speach imports."

Williamsburgh City Fire Insurance Co. vs. Willard, 164 Fed. 404.

"Words used in a policy of insurance should be given their common, ordinary meaning rather than that of the lexicographers or those skilled in the niceties of language."

Other citations too numerous to list follow this same theory of the law, and there seems to be no dispute as to this law, and this is particularly so in the State of Washington where this contract must be interpreted.

G. "APPELLEE IS BOUND WHETHER OR NOT HE READ THE POLICY CONTRACT."

We have no argument with the law as set forth by appellant under this heading; but it should be borne in mind by the court that the application for this insurance policy was admittedly prepared by the agent of the appellant from information which he had on hand, and that he did not request of appellee any further or additional information, and that he at all times knew of the conditions and facts surrounding appellee's operations and that said insurance policy did not in any way restrict appellee's growth or expansion, or make any provision that he notify

the company of any changes or alterations in his business operation. We must accept progress and expansion and that must be assumed by the appellant in the issuance of its policies. From the monthly report prepared by appellee and delivered to appellant, through its agent, the company was advised of the increasing amount of business handled by appellee; and if they were desirious of further information as to how his business was handled or changed, they had the right to request it or make provision for such information in their policy.

H. "KNOWLEDGE OF AGENT IS IMMATERIAL"

We disagree with appellant's argument, for the principal is bound by the knowledge of his agents.

Higgins vs. Daniel
5 Wash. (2d) 134, 105 Pac. (2d) 24;

L. J. Dowell, Inc. vs. United Pacific Casualty Insurance Co., 191 Wash. 666, 72 Pac. (2d) 296;

Miller vs. United Pacific Casualty Insurance Co.,
187 Wash. 629, 60 Pac. (2d) 714;

Alaska Steamship Co. vs. Pacific Coast Gypsum Co.,
78 Wash. 247, 138 Pac. 875;

Staats vs. Pioneer Insurance Association,
55 Wash. 51, 104 Pac. 185.

Appellant made no showing of limitation of authority on their agents, and their agent Orkney was the only person with whom Mr. Kirkevold ever dealt, and was the per-

son upon whom he called when desiring information as to his policies and to whom he reported on all his activities.

I. "ERRORS IN ADMITTING APPELLEE'S EVIDENCE."

Appellant has not shown where he has in any way been prejudiced by the admission of any evidence or exhibits in this cause of action. It must be remembered that this was an action tried before the court, not before a jury. Appellant took exception to the admission of plaintiff's Exhibit 8, being a small notebook in the handwriting of appellant's agent, and listing the various insurance policies, and stating therein that appellee was insured under the policy in question in the sum of $100,000.00.

Obviously, where the trial court charged 25% of the coats destroyed against the $10,000.00 provision of the insurance policy, it shows that the court was not mislead by this figure or by the exhibit, and no attempt was made by this evidence to alter or amend Exhibit 1, the written contract between the parties hereto.

Appellant objects to the admission of plaintiff's Exhibits 6 and 7, being advertising circulars, showing the publication of appellee's coverage, and were offered for this purpose only, and no attempt was made to make this advertising material binding upon the appellant, or in any way incorporated in the insurance policies.

Appellant's objection to Exhibit 4 is not well taken, for

Exhibit 4 was merely an original copy of an assignment on the McGilvery coat, a copy of which had been previously served upon counsel for appellant under the request for admission, and which appellant admitted in its answer to said admission, admitting the genuineness and validity of all of the releases and assignments and, further, said assignment was admitted in open court (68) by the admission of all of said matters when Exhibit 3 was admitted in evidence.

We do not believe that appellant herein can raise any objection to plaintiff's Exhibit A-1 at the subsequent hearing, being a note book containing the various figures relating to the transaction on the replacement of coats, for this material was furnished at appellant's insistance, and the amounts and all the matters shown in said note book were testified to in open court; so that appellant was not in any manner prejudiced by the admission of this note book which was kept by one of appellee's employees in the ordinary course of business.

J. "LIABILITY AS TO EACH COAT CANNOT EXCEED VALUATION, IF ANY, STATED ON THE RECEIPT THEREFOR."

Where a receipt was issued upon a coat and where the receipt stated no valuation, no claim has at any time been made for any amount in excess of the valuation listed upon

said receipt. Many of the coats, however, had a valuation listed higher than that as finally claimed by appellee and appellant received the benefits of this reduction. The only exception to this rule was where coat owners, whose coats appellee had in storage or in his possession for repair, had a certificate or floater policy. In that case, appellee had made it a custom to list the valuation of that coat at $200.00. Appellee, however, included in his monthly report the value of the certificate. This was testified to by appellant's agent, Mr. Orkney (306). In other words, the Company at all times received the full premium on these valuations, and this was within the knowledge of appellant's agent (307). Some of the coats which were received by appellee contained no valuation, this was particularly true of many of the coats which were held by appellee for repairs and remodeling only, and which were not held for permanent storage. Why no valuation was stated on said receipts seems to be an error of appellee's employees in the receiving room. However, appellee paid the premium to the insurance company on the coats which he held for repair as well as those he held for storage (308). There were also a very few coats for which, for some unknown reason, no receipt was ever issued; but all of said coats whether receipted, whether valued or otherwise, were all valued in the monthly report delivered to the appellant and the premium of insurance was paid upon such valuation. The valuation, as testified to by Mr. Kirkevold on those coats where no valua-

tion was set, was the valuation which he listed and reported to the appellant on his monthly reporting system.

Appellant has suffered no loss through these acts of appellee, and as was stated in *Ohio Casualty Insurance Company vs. Miller,* 29 Fed. Supp. 993:

> "It is a well recognized rule that courts do not favor forfeiture of insured's rights in any kind of insurance contract where there has been a substantial compliance with the terms."

The Insurance Company accepted the premium and issued insurance upon the valuations as submitted in the monthly reporting system, and they should not now be allowed to plead technicalities and reap the benefit of their bargain without assuming the liabilities which are imposed and assumed by them.

Appellant had the right under the policy (49) to at any time inspect any records and avail itself of any information, and they should not now plead their own neglect as a defense.

It should be borne in mind that each of the certificate holders filed separate proofs of loss for the full amount of their certificates so that the insurance company has not been mislead by the filing of a proof of loss of a smaller amount, and they have made no offer to refund any insurance premiums accepted by them for the additional amount of coverage which was paid for twice.

Appellant on page 72 of its brief has raised some objections to Proposed Findings of Fact and Conclusions of Law (398), which were proposed under the Trial Court's original decision. However, the Court refused to sign these Proposed Findings of Fact and Conclusions of Law. They are not a part of the record and were never made an exhibit in the case. For that reason they are not a part of the action or rightly before this Court for consideration. It should also be noted that appellant proposed no Findings of Fact and Conclusions of Law of its own, and made only some form of objection to appellee's proposed findings as ultimately submitted, not the ones which are included and referred to as part of the record at 398.

Also, the Court changed its theory of recovery and did not base its decision upon the valuation of the specific coats; for the valuation of these coats, at the time of their destruction, was in excess of the amount which was submitted under the original Finding, due to the fact that the appellant was given credit for the amount saved on some of the cash settlements; and the valuation is much less than the proof of loss which, in our opinion, would be the maximum amount of recovery to which we would be entitled.

Appellee submits, however, that the maximum amount of proof of loss should be considered and appellee should not be limited in his amount of recovery to the value listed on each specific coat referred to in the proof of loss. For,

as before stated, the appellant was given the advantage of the fact that some of the coats were not as highly valued as originally listed in the proof of loss. With the right of taking this benefit, the appellant should also be subject to the detriment of increased amounts on certain coats if it was found that the coats as originally listed in the proof of loss were in error for they should not be entitled to take the benefits and scorn the detriments where it makes no change in the total amount as claimed.

K. "LIABILITY CANNOT EXCEED AMOUNT STATED IN APPELLEE'S PROOF OF LOSS, NOR AMOUNTS PAID."

We believe that we have fully answered this contention in the previous argument, in stating that the total amount of our amounts claimed are not in excess of our proof of loss and judgment granted is not in excess of the cost to the appellee of the replacement of the coats made, and the cost of the actual cash expended in making settlement.

L. "LIABILITY ON REPLACED COATS CANNOT EXCEED APPELLEE'S WHOLESALE COST."

We cannot follow appellant's argument that the amount of their liability on replaced coats should not exceed appellee's wholesale cost. The terms of the Policy are (48 and 49)

> "This company shall not be liable hereunder . . . nor in any event for more than the cost to repair or replace the article with materials of like kind and quality."

The court will note that this does not state that the liability is limited to the cost of purchasing the article, but is limited to the cost of replacing the article. The Court in determining the amount of this judgment deducted from the retail cost of the coat what appellee testified was his net profit; and, also, deducted from the amount of the replacement of his retail cost of the coat any other operation expenses that appellee was not obligated to pay due to the fact that this was replacement, such as his percentage payment to the Barnes-Woodin Company and other expenses.

There can be little argument but that the cost of replacing an article would include the costs of alteration and the necessary payment of appellee's employees to see that the coat was fitted, handled and properly presented and styled to the customer's satisfaction. As a matter of fact, the Court denied to the appellee himself (365) any amount of time or labor that he expended himself in the settlement of these claims or their replacement. The Court admittedly took a figure which was not one as definitely testified to as being specificially and exactly the amount of loss necessary to do business.

Again, it should be remembered by the Court that this method of reaching the judgment was one which was in-

sisted upon by the appellant and was contrary to the pre-trial arranged method of reaching valuations. And it should be further remembered that the appellant offered no evidence whatsoever, to show what these valuations might be, nor did appellant offer to the Court any other method, or any other testimony, which the Court could use in reaching a decision.

We again cite to the Court *45 C. J. S.* 915, which sets forth the rule that the court is given the right to use estimate and some form of speculation in reaching the judgment. We do not believe the appellant should now be heard to complain that the method which he insisted upon is wrong and that due to his neglect in offering contrary testimony the Court followed the testimony of appellee. The decision as reached by the Court upon this method is beneficial to appellant for it reduced the amount of judgment as originally determined by the Court.

Appellee objected to this method of determining judgment, contending that the valuation of coats at the time of the fire was his proper method; and though appellee did not appeal from this ruling, and is not now attempting to be heard upon any objection, we believe it should be cited to the court that this is the wrong method and that appellant benefited by the Court's final method.

45 C. J. S. 1013, Sec. 915,

"While there is authority to the contrary, it has been

held, as a general rule, or in the absence of a provision for such measure, that the cost of restoring or replacing the property is not the measure of the insurer's liability for its loss, although the cost of replacing goods or buildings may be considered as evidence of the value of the property. However, under some statutes insured may elect whether to accept from insurer the repair of the property damaged or a sum of money equal to the damage done; and a provision of a standard policy form that the loss or damage shall in no event exceed what it would cost insured to repair or replace the property has been held valid as to personalty. Where a statute or the policy limits the amount of recovery as to the cost of restoring, replacing or repairing the property, the measure is the cost of such restoration or replacement, and not the cash or market value of the property damaged or lost, or the difference between the values before and after the fire, unless the insured property is such that it cannot be replaced within a reasonable time, in which case its actual cash value may be recovered. Such a provision contemplates the restoration of the property to substantially as good condition as it was in before the fire, and is material when the fire has not resulted in a total loss, but if the property cannot be restored to its former condition the difference between the sound value and the value of the remains as salvage determines the amount of loss. Under such a provision an increase in the cost of repairing by reason of building laws or regulations has been held included, but the contrary has also been held, especially where such increase is excluded by a provision in the policy.

"A policy provision that the loss or damage shall in no event exceed what it would cost insured to repair or replace the property with material of like kind and quality has been held to constitute merely a limitation on the amount of recovery and not a substantive measure of damages which insured may invoke. In the absence of such provisions, it has been held that the cost

of repairing the article plus any difference between its value as repaired and the sound value on the date of the fire is to be awarded. If the value is to be arrived at by replacement or reproduction cost, it has been held that depreciation may not be deducted from the cost of replacement and restoration.

"*It has been held that, where insurer refuses to replace the property destroyed with other property or to furnish money to replace it, it cannot insist that the loss should be measured by the value of the property it refused to buy.*" (Italics ours)

In view of the last paragraph of the last cited section, the appellant herein had the opportunity to go out and settle with the public, or it had the opportunity to advance to appellee sufficient sums of money to make settlement with customers who were insured under this policy. However, the appellant decided to stand upon its $10,000.00 limitation and did not go out and make settlement itself, or advance to the appellee any moneys with which to make settlement. It is true, that by aggreement they did advance $8,200.00, but only after appellee had made settlement with customers in excess of $20,000.00; therefore, they let the appellee assume the responsibility and take the gamble of any recovery, yet they now desire, and the Court granted them the right, to come in and profit by appellee's ability to make lesser settlements by the replacement of coats at actual wholesale price, plus cost of doing business, out of his own funds and stock. Therefore, they allowed to appellee no profit, or no gain, to which he should have

been entitled due to his gambling on the right of recovering from the insurance company.

M. "INSURANCE IS SOLELY FOR INDEMNITY, NOT FOR PROFIT."

We believe this theory of law is true where an insurance company advances the money and makes it possible for the appellee to indemnify himself, but where the insurance company withholds the funds and refuses to make payments not upon a loss suffered by appellee, but upon a loss suffered by third persons; then we submit that the appellee should be entitled to any profit he has made through his own ability of making good settlement, and has secured assignment of the customers' loss.

N. "APPELLEE'S GROSS PROFIT RATHER THAN NET PROFIT SHOULD BE DEDUCTED."

We believe that this section of appellant's argument has been fully answered in the preceding two arguments, for we could not say that the cost of replacing a house is merely the cost of the materials which go into that house, and that we will allow nothing to assemble and build house or structure, for this same theory of law would go to the replacement of a fur coat which would need repairs, alterations, fittings and handling.

O. "REPLACEMENTS ARE NOT TAXABLE AS SALES."

Many of the coats which appellee sold were sold at a

price substantially in excess of the amount that the purchaser had coming from the previous loss. Some persons purchased a more valuable coat, and others found that the valuation that they had listed upon their receipt would not replace a coat of like kind and character, and it was therefore necessary for many of the people to pay a substantial balance. As a matter of fact, the coats which appellee sold to persons who had a credit coming from the fire loss amounted to $4,712.47 in excess of the replacement allowance or cost. It has been our contention that this amount should have been allowed wholly to appellee as a profit from his sales for naturally he suffered many original sales from which he would have made his normal profit by the Court's stating that he must give to the appellant the credit for the replacement, for we believe that it can be assumed many of these people who replaced coats would have, during these prosperous years, purchased a new coat which would have been clear profit to appellee. However, in the computing of the judgment appellant was given the benefit of this overage, though the Court did allow appellee to deduct from that amount the 20% federal luxury tax which he was obligated to pay on his sales. From this method as used by the trial court, the appellant gained $1,151.01 more than it should have, even by the method as used by the trial court.

MOTION TO STRIKE

We believe that this fully answers appellant's brief and arguments, with this exception—that appellant has attempted to continue his arguments and avoid the court rules of eighty pages by listing additional argument under the heading of "Appendix" and for this reason we hereby move that the appendix be stricken from appellant's brief or that the brief be not given consideration due to the violation of Court Rule No. 20-2(f) for said Rule provides that there shall be included in the appendix only matters of statute, treaty, regulation or rule, or matters quoted from opinion; yet appellant has listed as one item on appendix pages LI to LVI an argument relating to the determination of values on coats, which are items clearly not within the purview of quotations or citations. Likewise, there are similar quotations on appendix pages XL and XLI, and arguments are continually interspersed in the remainder of the appendix; however, if the Court recognizes this as properly part of the appendix, we wish to state in relation to the coats and the listing of the items therein that the Court did not use this method in reaching the amount of its judgment, but reached a method as requested and demanded by appellant for the actual expediture of cash and replacement of coats, which was to their benefit and which they should not now be heard to object to.

CONCLUSION

The appellee in conclusion, therefore, states that if any errors have been committed by the court in the trial of this action, they were errors beneficial to the appellant and detrimental to the appellee. The appellee, however, has raised no objection to these errors, and this Court should therefore affirm the trial court's judgment as the same was based upon fact and was a factual matter determinable by the trial court and which should not be upset or altered by this Court.

Respectfully submitted,

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